Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (joint administrator and dependant of Chandran a/l Perumal, deceased) & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01 (f)-2-01 OF 2018(W)

ROHANA YUSUF PCA, ABANG ISKANDAR CJ (SABAH AND SARAWAK), NALLINI PATHMANATHAN, ABDUL RAHMAN SEBLI, ZABARIAH YUSOF, HASNAH HASHIM AND RHODZARIAH BUJANG FCJJ

22 MARCH 2021

Constitutional Law — Fundamental liberties — Right to life — Whether estate of persons who died while under police custody due to deliberate or negligent acts or omissions of the police could claim no more damages than what was prescribed under ss 7 or 8 of the Civil Law Act 1956 ('the CLA') — Whether estate of deceased was entitled to plead and bring both a private law claim in tort under the aforesaid provisions of the CLA and a public law claim for damages under the FC for infringement of the right to life under art 5(1) — Whether the remedies for such infringement were available in Schedule 1 to para 25 of the Courts of Judicature Act 1964 — Whether High Court had the duty, jurisdiction and power to grant the reliefs available for breach of a fundamental constitutional right or mould the relief required to compel observance of that right — Federal Constitution art 5(1)

The respondents were the wife and daughter of one Chandran a/l Perumal ('Chandran') and the joint administrators of his estate. They sued the appellants for damages for causing Chandran's death while he was under police custody following his arrest on suspicion of being involved in a kidnapping case. The claim against the appellants was premised on ss 7 and 8 of the Civil Law Act 1956 ('the CLA') as well as for breach of Chandran's constitutional right to life under art 5(1) of the Federal Constitution ('the FC'). An inquest found that Chandran died of hypertensive heart disease and that his custodians had not only denied him of his daily medication for a pre-existing medical condition but also of food, drink, sleep and medical treatment. Chandran had also suffered injuries to his body during the detention. He died on the fifth day of his detention while in solitary confinement. Following a full trial, the High Court found the appellants liable in negligence and public misfeasance and for infringing Chandran's constitutional right to life and awarded the respondents RM3,500 as special damages, RM10,000 for bereavement, RM144,000 for loss of dependency and RM200,000 as exemplary damages and costs. Without disputing liability, the appellants appealed to the Court of Appeal ('COA') solely against the award for exemplary damages on the ground that that award

was precluded by s 8(2)(a) of the CLA, but the appeal was dismissed. They were granted leave to file the instant appeal against the decision on the sole question 'Whether s 8(2) of the Civil Law Act 1956 is an absolute bar to the award of exemplary damages in an estate claim?'. The Federal Court had previously decided in a similar custodial death case by a majority that the estate of the deceased could not obtain exemplary damages under s 8(2)(a) of the CLA and that except for the private law remedies provided in ss 7 and 8 of the CLA, no remedy was available for the infringement of a fundamental right under the FC as the FC itself did not expressly provide for such remedy or redress. The minority, however, held that a person who had died as a result of a wrong done to him by the State had suffered an infringement of his right to life under art 5(1) and should be awarded compensatory damages apart from punitive, exemplary or aggravated damages to register the court's indignation over the abhorrent conduct that led to his death. The minority also ruled that since the CLA was enacted before the FC came into being, art 162(6) of the FC had to be applied to interpret s 8(2)(a) of the CLA in a manner that accorded with the FC to allow exemplary damages to be awarded if the cause of action concerned the breach of a constitutionally-guaranteed fundamental right.

Held, unanimously answering the leave question in the affirmative but, by majority, allowing the appeal and substituting the exemplary damages awarded by the trial court with an award of RM200,000 for aggravated damages:

(1) **(per Nallini Pathmanathan FCJ, dissenting)** Chandran's estate was entitled on the facts of the instant case to bring both a private law claim in tort under the provisions of the CLA and a public law claim under the FC for infringement of the right to life under art 5(1). They were distinct and separate claims. The respondents had expressly pleaded in the alternative an infringement of art 5(1) of the FC and the trial court had expressly found that the said constitutional right had been infringed (see paras 17, 30 & 104).

(2) **(per Nallini Pathmanathan FCJ, dissenting)** Although a claim for exemplary damages was not available to Chandran's estate under s 8(2) of the CLA, on the facts of the instant case such damages were available under the public law claim for infringement of the constitutional right to life under art 5(1) for which redress was available under Schedule 1 to para 25 of the Courts of Judicature Act 1964 ('the CJA') which stipulated that the remedies set out thereunder were for, inter alia, the purpose of enforcing fundamental rights under Part II of the FC. It was open to the court to mould the relief required to compel observance of the constitutional right. Given the arbitrary, oppressive and unconstitutional conduct of the appellants as servants of the State (all hallmarks of the basis on which exemplary damages could be granted) the appropriate relief was monetary compensation payable to Chandran's estate. Where the victim was killed as a result of wrongful acts, like Chandran was, his

A estate was entitled to receive the damages — whether it was exemplary or aggravated — for the breach of his constitutional right to life under art 5(1). The High Court's assessment and grant of RM200,000 in exemplary damages was cogently reasoned and was affirmed (see para 104).

B (3) **(per Nallini Pathmanathan FCJ, dissenting)** The fact that the FC itself did not expressly stipulate the remedies available for infringements of the rights set out in Part II of the Constitution did not render those remedies, which were available under Schedule 1 to para 25 of the CJA, nugatory or preclude them from being utilised for precisely that purpose. Every High C Court in this country had the jurisdiction and power to afford relief to any citizen who had suffered an infringement of his/her fundamental rights as set out in the FC. Where death was caused as a result of such infringement, the deceased's inheritors or his estate and his beneficiaries could similarly seek recourse (see paras 75, 81 & 90).

D (4) **(per Rhodzariah Bujang FCJ, majority)** The court had to give effect to the clear and unambiguous words in s 8(2) of the CLA which precluded an award of exemplary damages in an estate claim. Section 8(2) of the CLA was not incongruous with art 5 of the FC; hence, no conflict existed E that required art 162(6) of the FC to be invoked to modify the reading of s 8(2) so that it accorded with the FC (see paras 124, 129 & 132).

(5) **(per Rhodzariah Bujang FCJ, majority)** As the victim of the punishable behaviour himself was not suing in this case but the suit was brought by his estate, the condition for the grant of exemplary damages F was not met. Also, nothing in the FC provided in any direct or vague way, the right of the estate of a deceased person to such damages (see paras 132–133).

(6) **(per Rhodzariah Bujang FCJ, majority)** For the wrong that was done G to Chandran, punishment ought to be meted out to the appellants with aggravated damages, which the respondents had specifically prayed for in their statement of claim. By its very nature, aggravated damages would compensate the victim or, as in this case, his estate for the unacceptable behaviour of the appellants. The respondents were entitled to such H amount in aggravated damages which reflected the sufferings the deceased and the court's abhorrence of the negligent conduct of the appellants. Accordingly, the award for exemplary damages granted by the trial court was substituted with an award of RM200,000 for aggravated damages (see paras 134 & 137–138).

I **[Bahasa Malaysia summary**

Responden-responden adalah isteri dan anak perempuan kepada Chandran a/l Perumal ('Chandran') dan pentadbir-pentadbir harta pusakanya. Mereka telah menyaman perayu-peryau untuk ganti rugi kerana menyebabkan kematian

Chandran semasa dia dalam tahanan polis berikutan tangkapannya kerana disyaki terlibat dalam kes penculikan.Tuntutan terhadap perayu-perayu berpremiskan ss 7 dan 8 Akta Undang-Undang Sivil 1956 ('AUS') dan juga kerana melanggar hak perlembagaan Chandran untuk hidup di bawah perkara 5(1) Perlembagaan Persekutuan ('PP'). Siasatan telah mendapati bahawa Chandran telah meninggal dunia kerana penyakit jantung hipertensi dan orang yang menjaganya bukan sahaja menafikan dia ubat hariannya untuk keadaan perubatan yang sedia ada tetapi juga makanan, minuman, tidur dan rawatan perubatan. Chandran juga telah mengalami kecederaan di badannya semasa dalam tahanan. Dia meninggal dunia pada hari kelima penahanannya semasa dalam penjara. Setelah perbicaraan penuh, Mahkamah Tinggi mendapati perayu-perayu bertanggungjawab kerana kecuaian dan misfeasans awam dan kerana melanggar hak perlembagaan Chandran untuk hidup dan mengawardkan responden sebanyak RM3,500 sebagai ganti rugi khas, RM10,000 untuk kesedihan, RM144,000 untuk kehilangan kebergantungan dan RM200,000 sebagai ganti rugi teladan dan kos. Tanpa mempertikaikan liabiliti, perayu-perayu telah merayu kepada Mahkamah Rayuan ('MR') semata-mata terhadap award untuk ganti rugi teladan atas alasan bahawa award tersebut dihalang oleh s 8(2)(a) AUS, tetapi rayuan tersebut telah ditolak. Mereka diberi kebenaran untuk memfailkan rayuan ini terhadap keputusan tersebut dengan satu-satunya persoalan 'Whether s 8(2) of the Civil Law Act 1956 is an absolute bar to the award of exemplary damages in an estate claim?'. Mahkamah Persekutuan telah terdahulu memutuskan seara majoriti dalam kes kematian dalam tahanan yang sama bahawa harta pusakan si mati tidak boleh mendapat ganti rugi teladan di bawah s 8(2)(a) AUS dan bahawa kecuali untuk remedi undang-undang persendirian yang diperuntukkan dalam ss 7 dan 8 AUS, tiada remedi yang tersedia untuk pelanggaran hak asasi di bawah PP kerana PP sendiri tidak dengan jelas memperuntukkan remedi atau ganti rugi sedemikian. Pihak minoriti, bagaimanapun, memutuskan bahawa seseorang yang meninggal dunia akibat kesalahan yang dilakukan kepadanya oleh pihak kerajaan telah mengalami pelanggaran haknya untuk hidup di bawah perkara 5(1) dan patut diawardkan ganti rugi berbentuk pampasan selain daripada ganti rugi punitif, teladan atau tambahan untuk menunjukkan tindakan mahkamah ke atas kelakuan keji tersebut yang membawa kepada kematiannya. Pihak minoriti juga memutuskan bahawa oleh kerana AUS telah digubal sebelum PP wujud, perkara 162(6) PP hendaklah terpakai untuk untuk mentafsir s 8(2)(a) AUS dalam cara yang sesuai dengan PP untuk membenarkan ganti rugi teladan diawardkan jika kausa tindakan adalah berkaitan pelanggaran hak asasi yang dijamin oleh perlembagaan.

Diputuskan, sebulat suara menjawab persoalan kebenaran secara afirmatif tetapi, melalui majoriti, membenarkan rayuan dan menggantikan ganti rugi teladan yang diawardkan oleh mahkamah perbicaraan dengan award RM200,000 untuk ganti rugi tambahan:

(1) **(oleh Nallini Pathmanathan HMP, menentang)** Harta pusakan Chandran berhak berdasarkan fakta kes ini untuk memulakan kedua-dua tuntutan undang-undang persendirian dalam tort di bawah peruntukan AUS dan tuntutan undang-undang awam di bawah PP kerana pelanggaran hak untuk hidup di bawah perkara 5(1). Kedua-duanya adalah tuntutan yang berbeza dan berasingan. Responden-responden dengan jelas telah mempli secara alternatif untuk pelanggaran perkara 5(1) PP dan mahkamah perbicaraan dengan jelas mendapati bahawa hak perlembagaan tersebut telah dilanggari (lihat perenggan 17, 30 & 104).

(2) **(oleh Nallini Pathmanathan HMP, menentang)** Walaupun tuntutan untuk ganti rugi teladan tidak tersedia untuk harta pusaka Chandran di bawah s 8(2) AUS, berdasarkan fakta kes ini, terdapat ganti rugi sedemikian di bawah tuntutan undang-undang awam untuk pelanggaran hak perlembagaan untuk hidup di bawah perkara 5(1) yang mana terdapat ganti rugi di bawah Jadual 1 kepada perenggan 25, Akta Mahkamah Kehakiman 1964 ('AMK') yang menetapkan bahawa remedi-remedi yang dinyatakan tersebut adalah untuk, antara lain, tujuan menguatkuasakan hak asasi di bawah Bahagian II PP. Ia adalah terbuka kepada mahkamah untuk membentuk relief yang dikehendaki untuk memaksa pematuhan hak perlembagaan. Memandangkan tingkah laku perayu yang sewenang-wenang, menindas dan tidak berperlembagaan sebagai kakitangan kerajaan (semua ciri asas yang dapat diberikan sebagai ganti rugi teladan) relief yang sewajarnya adalah pampasan berbentuk wang perlu dibayar kepada harta pusaka Chandran. Di mana mangsa telah dibunuh akibat perbuatan yang tidak betul, seperti dalam kes Chandran, harta pusakanya berhak menerima ganti rugi — sama ada ganti rugi teladan atau tambahan — kerana pelanggaran hak perlembagaannya untuk hidup di bawah perkara 5(1). Taksiran dan pemberian ganti rugi teladan berjumlah RM200,000 oleh Mahkamah Tinggi adalah dengan alasan yang wajar dan disahkan (lihat perenggan 104).

(3) **(oleh Nallini Pathmanathan HMP, menentang)** Fakta bahawa PP sendiri tidak dengan jelas menetapkan remedi yang tersedia untuk pelanggaran hak-hak yang dinyatakan dalam Bahagian II Perlembagaan tidak menjadikan remedi-remedi tersebut, yang sedia ada di bawah Jadual 1 kepada perenggan 25 AUS, sia-sia atau dihalang daripada digunakan untuk tujuan khusus tersebut. Malah Mahkamah Tinggi dalam negara ini mempunyai bidang kuasa dan kuasa untuk memberikan relief kepada mana-mana warganegara yang mengalami pelanggaran hak asasinya sepertimana dinyatakan dalam PP. Jika kematian disebabkan akibat pelanggaran tersebut, pewaris si mati atau harta pusakanya dan benefisiarinya boleh memohon untuk mendapatkan yang sama (lihat perenggan 75, 81 & 90).

(4) **(per Rhodzariah Bujang HMP, majoriti)** Mahkamah perlu memberi kesan kepada perkataan-perkataan yang jelas dan tidak taksa dalam s 8(2) AUS yang menghalang ganti rugi teladan dalam tuntutan harta pusaka. Seksyen 8 (2) AUS adalah selaras dengan perkara 5 PP; oleh itu, tidak terdapat konflik yang menghendaki perkara 162(6) PP digunakan untuk mengubahsuai pembacaan s 8(2) agar ia selaras dengan PP (lihat perenggan 124, 129 & 132).

(5) **(per Rhodzariah Bujang HMP, majoriti)** Oleh kerana mangsa untuk kelakuan yang boleh dihukum itu tidak menyaman sendiri dalam kes ini tetapi saman telah dimulakan oleh harta pusakanya, syarat untuk memberikan ganti rugi teladan tidak dipenuhi. Juga, tiada apa-apa dalam PP yang memperuntukkan apa-apa cara secara langsung atau tidak jelas, berhubung hak harta pusaka si mati ke atas ganti rugi tersebut (lihat perenggan 132–133).

(6) **(per Rhodzariah Bujang HMP, majoriti)** Untuk kesalahan yang dilakukan kepada Chandran, hukuman yang patut dijatuhkan ke atas perayu-perayu adalah ganti rugi tambahan, yang mana telah dipohon secara spesifik oleh responden-responden dalam penyataan tuntutan mereka. Berdasarkan sifatnya, ganti rugi tambahan akan memberi pampasan kepada mangsa atau, dalam kes ini, harta pusakanya untuk kelakuan yang tidak dapat diterima oleh perayu-perayu. Responden-responden berhak mendapat sejumlah ganti rugi tambahan yang mencerminkan penderitaan si mati dan kebencian mahkamah terhadapa kelakuan cuai perayu-perayu. Oleh demikian, award untuk ganti rugi teladan yang diberikan oleh mahkamah perbicaraan telah digantikan dengan award RM200,000 untuk ganti rugi tambahan (lihat perenggan 132 & 137–138).]

Cases referred to

A v Bottrill [2003] 1 AC 449, PC (refd)
Ashley v Chief Constable of Sussex Police [2008] 2 WLR 975, HL (refd)
Assa Singh v Mentri Besar, Johore [1969] 2 MLJ 30, FC (refd)
Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 AC 328, PC (refd)
B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 1 MLJ 169, PC (refd)
Cassell & Co Ltd v Broome [1972] AC 1027, HL (refd)
Chin Choy & Ors v Collector of Stamp Duties [1979] 1 MLJ 69, FC (refd)
DK Basu v State of West Bengal (1997) 1 SCC 416, SC (refd)
Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal [2015] 1 MLJ 353; [2014] 9 CLJ 15, CA (folld)
Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop [2018] 5 MLJ 141; [2018] MLRAU 213, FC (refd)

Kerajaan Negeri Selangor & Ors v Sagong Bin Tasi & Ors [2005] 6 MLJ 289, CA (refd)
Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals [2018] 3 MLJ 184, FC (refd)
Ketua Setiausaha Kementerian Dalam Negeri dan lain-lain lwn Ghaur Chandram a/l Murugesu (mendakwa bagi pihak diri sendiri dan kesemua orang tanggungan sebagai bakal pentadbir sah harta pusaka Uthayachandran a/l Ghaur Chandram) dan satu lagi rayuan [2016] MLJU 1716; [2016] 3 CLJ 210, CA (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301, FC (refd)
Khatri and Ors v State of Bihar (1981) 1 SCC 627, SC (refd)
Merson v Cartwright and Another [2006] 3 LRC 264, PC (refd)
Nilabati Behera v State of Orissa 1993 AIR 1960; 1993 SCR (2) 581, SC (refd)
Nothman v Barnet London Borough Council [1978] 1 WLR 220, CA (refd)
Nurasmira Maulat bt Abd Jaffar & Ors v Ketua Polis Negara & Ors [2015] 3 MLJ 105, CA (refd)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97, FC (refd)
Pinner v Everett [1969] 1 WLR 1266, HL (refd)
PP v Kok Wah Kuan [2008] 1 MLJ 1, FC (refd)
PP v Gan Boon Aun [2017] 3 MLJ 12, FC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1996] 1 MELR 71; [1996] 1 MLRA 725, FC (refd)
Rookes v Barnard and others [1964] AC 1129, HL (refd)
Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors [1996] 3 MLJ 337; [1996] 1 MLRH 548, HC (refd)
Sambu Pernas Construction & Anor v Pitchakkaran [1982] 1 MLJ 269; [1982] 1 MLRA 143, FC (refd)
Tan Kim Chuan & Anor v Chandu Nair [1991] 2 MLJ 42; [1991] 1 CLJ Rep 441, SC (refd)
Tenaga Nasional Bhd v Pearl Island Resort Development Sdn Bhd [2017] MLJU 1193; [2017] 9 CLJ 199, FC (refd)
Thompson v Goold & Co [1910] AC 409, HL (refd)
Vengadasalam v Khor Soon Weng & Ors [1985] 2 MLJ 449, SC (refd)
Walumba Lumba (previously referred to as WL) (Congo) 1 and 2 v Secretary of State for the Home Department [2011] UKSC 12, SC (refd)
Zulkiply bin Taib & Anor v Prabakar a/l Bala Krishna & Ors and other appeals [2015] 2 MLJ 607; [2015] 2 CLJ 766, CA (refd)

Legislation referred to

Aboriginal Peoples Act 1954 s 12
Capital Territory's Civil Law (Wrongs) Act 2002 [AU] s 16(2)
Civil Law Act 1956 ss 7, 8, 8(2), Part III
Civil Law Act [SG] s 10(3)

Constitution of Trinidad and Tobago [TT]
Courts of Judicature Act 1964 ss 23, 24, 25, Schedule
Constitution of India [IN] arts 14, 21, 32, 226
Fatal Accidents Act 1976 [UK] s 1
Federal Constitution arts 5, 5(1), (3), (4), 13(2), 121, 162, 162(6), (7), Part II
Law Reform Act 1936 [NZ] s 3(2)
Law Reform (Miscellaneous Provision) Act 1934 [UK] s 1(1)
Northern Territory of Australia's Law Reform (Miscellaneous Provisions) Act 1956 [AU] s 6(1)(a)
Restricted Residence Enactment 1933

Appeal from: Civil Appeal No W-01(NCVC)(W)-36–01 of 2017 (Court of Appeal, Putrajaya)

Andi Razalijaya bin A Dadi (Ungku Alfiati Zabedah Ungku Ismail with him) (Senior Federal Counsel, Attorney-General's Chambers) for the appellants.
M Visvanathan Karnan (Saibullah MV Nathan & Co) for the respondents.

Nallini Pathmanathan FCJ (delivering dissenting judgment of the court):

INTRODUCTION

[1] Custodial deaths are one of the most reprehensible of wrongs in a civilised society governed by the rule of law. All the more so, when those conferred with the responsibility of protection and care on behalf of the State, like the appellants here, are themselves the perpetrators of inhumane acts and omissions of neglect or violence, resulting in the detainee's death.

[2] The sanctity of human life is the most cherished value of an evolved society. Accordingly, most legal systems identify, acknowledge and protect the right to life as the most basic of human rights. Malaysia is no exception. Such protection takes its form in art 5(1) of Part II of the Federal Constitution ('the FC'). It provides that no one shall be deprived of his life or personal liberty save in accordance with law.

[3] This precious right of life is available to all and cannot be denied to persons in custody, prisoners or persons awaiting trial. On the contrary, there is a great responsibility on the police and prison authorities to ensure that citizens held in custody are not deprived of this fundamental right, save for such restrictions as are permitted by law. Unfortunately, Chandran a/l Perumal was deprived of his fundamental right to life while being held in custody.

A THE CUSTODIAL DEATH OF CHANDRAN A/L PERUMAL

[4] In the appeal before us, one Chandran a/l Perumal ('Chandran') died while in police custody at the detention facilities of the Dang Wangi police station. An inquest was conducted to ascertain Chandran's cause of death. The coroner, in his verdict found that the police had acted inhumanely towards Chandran. He had deliberately been deprived of essential medication to treat his medical condition. The cause of death was hypertensive heart disease.

[5] Chandran was taken into custody on 6 September 2012, on suspicion of having being involved in the kidnapping of a baby together with two others. The High Court found subsequently that there was no basis for the complaint.

[6] Soon after his arrest, his family informed the police of his medical condition, and tried to hand over his medication at the station, to no avail. Chandran began behaving bizarrely, shouting and ranting while in detention, probably as a consequence of not having his medication. He was accorded no medical treatment despite an express order made by the magistrate during the remand hearing that he should be given adequate medical treatment.

[7] Chandran was then isolated in a cell with no toilet and a bare floor on which to sleep. It appears that he did not eat or drink during his detention. There were also some injuries on his person which were assessed to have most likely occurred during the period of detention.

[8] In summary, during his detention, he was deprived of medication, medical care, food, drink and sleep. He was also physically injured.

[9] Chandran died on the morning of 10 September 2012 at around 7.48am while in isolation in his cell, according to the pathologist. However, the police recorded his death as having occurred some 12 hours later at around 7pm.

H CLAIM BY CHANDRAN'S ESTATE

[10] Chandran's administrators brought a claim against the appellants premised on both the Civil Law Act 1956 ('the CLA'), more particularly ss 7 and 8, as well as for the *breach of Chandran's constitutional right to life*.

[11] The learned judge of the High Court, after a lengthy trial handed down a meticulously reasoned judgment, concluding that Chandran's death was caused by the failure to accord Chandran the basic requirements of proper

medication, medical attention and assistance. His death could have been avoided. The appellants were found liable for Chandran's death in, inter alia, negligence and public misfeasance.

THE HIGH COURT JUDGMENT

[12] In His Lordship's comprehensive judgment, the High Court judge found liability against the appellants in the tort of negligence, entitling the estate to damages for the wrongful death. He also found that Chandran's constitutional right to life under art 5(1) of the FC had been infringed. Damages were awarded, including exemplary damages of RM200,000 for the breach of Chandran's constitutional right to life.

THE APPEAL TO THE COURT OF APPEAL

[13] The appellants appealed to the Court of Appeal solely against the grant of exemplary damages as well as the quantum so awarded. The Court of Appeal upheld the decision of the High Court, and dismissed the appeal.

THE QUESTION OF LAW BEFORE THIS COURT

[14] Leave was granted to the appellants to have the following question of law determined:

> Whether section 8(2) of the Civil Law Act 1956 [Act 67] is an absolute bar to the award of exemplary damages in an estate claim?

The focus of the question is on exemplary damages. This is because s 8(2) of the CLA prohibits the grant of exemplary damages in an estate claim for wrongful conduct. Etymologically 'exemplary' is derived from the Latin word 'exemplum' which means 'example'. So when we speak of exemplary damages, it is to make an example of the persons or body that behaved abhorrently, resulting in the damage or loss, here the loss of life. So the awarding of exemplary damages against the appellants, the police here, is to make an example of this case by awarding damages as a punishment and deterrence.

[15] This question of law relating to the grant of exemplary damages is framed solely within the context of the Civil Law Act 1956 ('the CLA'). *It makes no reference to the finding of an infringement of Chandran's constitutional right to life under art 5(1) of the FC.*

THE DECISION OF THIS COURT IN *NURASMIRA*'S CASE

[16] This court had occasion to consider a similar question in *Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other*

appeals [2018] 3 MLJ 184 ('Nurasmira'), which comprised three independent appeals.

[17] Three appeals were dealt with in *Nurasmira*'s case. The details are set out there and I do not propose to reproduce them here. All three appeals were premised on claims based on ss 7 and 8 of the CLA 1956. None of them expressly pleaded an infringement of art 5(1) of the FC. In the instant case such a plea has been made.

[18] One of the questions of law in *Nurasmira,* more particularly in the appeal relating to Kugan a/l Ananthan ('Kugan'), who had sought exemplary damages, is similar to the question of law in this appeal.

[19] In *Kugan*'s appeal the question of law was *whether s 8(2) of the CLA, which bars the awarding of exemplary damages in an estate claim is applicable where the death of the deceased is as a result of a breach of his constitutional right to life.*

[20] *This court held by a majority that exemplary damages were not available for custodial deaths under ss 7 and 8 of the CLA, even where the death of the deceased was as a result of a breach of the constitutional right to life.*

THE MAJORITY JUDGMENT IN NURASMIRA

[21] In the majority judgment, this court speaking through Zaharah Ibrahim FCJ (later CJM) held, inter alia, that:

(a) the right of the dependents of a deceased person and the estate of a deceased person to claim damages relating to wrongful deaths was conferred by statute and as such that claim had to be determined strictly within the confines of the statute (see *Sambu Pernas Construction & Anor v Pitchakkaran* [1982] 1 MLJ 269; [1982] 1 MLRA 143 ('Sambu Pernas') and ss 7 and 8 CLA);

(b) the Court of Appeal in allowing exemplary damages by relying on *Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975 (HL) ('Ashley') had misapprehended the judgment of Lord Scott of Foscote in the case. This, it was stated, was because he did not state that exemplary damages are maintainable in a claim for damages for assault and battery. Instead this court pointed to the fact that he had said that vindicatory damages *could* be awarded for the breach of a fundamental right. Such vindicatory damages were to vindicate the transgressed rights of the claimant. No exemplary damages were therefore available to the estates of the deceased victims in the three appeals before the apex court, premised on a reading of *Ashley*. This was fortified by the decision of the English Supreme

Court in *Walumba Lumba (previously referred to as WL) (Congo) 1 and 2 v Secretary of State for the Home Department* [2011] UKSC 12 where Lord Dyson was of the opinion that vindicatory damages ought not be introduced into the law of tort as it would amoun t to letting 'an unruly horse loose on our law'. As the present appeal did not deal with vindicatory damages but instead exemplary damages the reliance on *Ashley* was misplaced;

(c) s 8(2) of the CLA expressly disallowed exemplary damages and this had to be given effect;

(d) *the Court of Appeal erred in awarding exemplary damages as a consequence of a breach of a constitutional right in Kugan's case.* This was because, it was held, the reliance placed on *Ashley* which in turn referred to the Privy Council decisions in Attorney General of *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 ('Ramanoop') and *Merson v Cartwright and Another* [2006] 3 LRC 264 ('Merson') had been misunderstood;

(e) *Ramanoop and Merson were cases occurring in Trinidad and Tobago and the Bahamas respectively, where applications for redress could be made directly to the apex court under their constitutional provisions. It was held that the Federal Constitution does not confer upon the courts such a jurisdiction nor such powers (see para 116)*;

(f) in *Ramanoop* the application for relief was made to the High Court, pursuant to specific provisions in the Constitution of Trinidad and Tobago. These constitutional provisions allowed for such an application 'without prejudice to any other action with respect to the same matter which is lawfully available'. In other words, tortious claims could also be brought under their relevant legislation. And in *Merson*, similarly, the Constitution of the Bahamas contains provisions similar to that of Trinidad and Tobago. However, the apex court would not exercise its power under the paragraph if satisfied that adequate means of redress were available to the persons aggrieved under any other law;

(g) this court concluded that as the *FC does not have provisions similar to those utilised in Ramanoop and Merson, any afflicted claimant, like Chandran in the instant appeal, would 'have to look elsewhere for redress'. The only available law was, it was held, the CLA with its limitations which contained a bar against the grant of exemplary damages in s 8(2)*;

(h) in short, it was held that notwithstanding the infliction of grievous wrong transgressing a person's life, in contravention of the express provisions of the FC, this court could afford no relief whatsoever, save for that enunciated in s 8 of the CLA. And this in turn was due to the absence of an express provision in the FC allowing the bringing of an action to redress such a wrong; and

A (i) *the net effect of the majority decision is that there is no redress to a person whose constitutional rights have been transgressed, despite a constitutional guarantee to that effect in art 5(1) of the FC.*

THE MINORITY OR DISSENTING JUDGMENT OF ZAINUN ALI
B FCJ IN *NURASMIRA*

[22] Zainun Ali FCJ delivered the sole dissenting judgment in relation to *Kugan*'s appeal, allowing exemplary damages for the breach of a constitutional right. In an illuminating judgment, Her Ladyship held, inter alia, as follows:

C
(a) Kugan's death amounted to a contravention of his right to life as guaranteed in art 5(1) of the FC;

(b) the doctrine of *ubi just, ibi remedium* (there is no wrong without a
D remedy) holds. Therefore, such a breach of a constitutional right should result in an appropriate constitutional remedy which would be separate and distinct from remedies under statute, common law and equity;

(c) s 8(2) of the CLA has no application at all to cases involving custodial deaths as the CLA deals primarily with private tort actions and deaths
E which are 'accidents', not custodial deaths which encompass a public law element;

(d) the CLA was in force prior to the FC and cannot be utilised to construe or limit fundamental rights in the FC. It is not applicable to
F constitutional torts — which is what custodial death cases amount to;

(e) it might be argued that the provisions of para 1 of the Schedule of the Courts of Judicature Act 1964 can be utilised (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1996] 1
G MELR 71; [1996] 1 MLRA 725 per Edgar Joseph Sr FCJ; and *Nilabati Behera v State of Orissa* 1993 AIR 1960; 1993 SCR (2) 581); and

(f) *where a wrong is committed by the State or an instrument of the State which has the effect of depriving the victim of his life in a manner not in accordance with law, the victim is entitled to an award of exemplary or aggravated*
H *damages. Section 8(2) of the CLA which contains a bar is inapplicable in Kugan's case which relates to a custodial death arising by reason of the breach of a constitutional right.*

I **[23]** The dissenting judgment therefore afforded the claimants redress for the considerable loss suffered by the victims as a result of the State failing to protect the most fundamental of rights guaranteed to a citizen of this country, literally the right to live, as a consequence of wrongs perpetrated by the police, for whose actions the State is liable.

THE SUBMISSIONS BY THE PARTIES BEFORE THIS COURT

The appellant's submissions

[24] The appellants' submissions may be summarised as follows:

(a) they relied primarily on the binding authority of the majority decision in *Nurasmira* to maintain that the Court of Appeal had erred in awarding exemplary damages to Chandran's estate;

(b) the clear statutory construction to be awarded to s 8(2) of the CLA was that exemplary damages could not be awarded as that category of damages was expressly excluded. The legal reasoning by the majority in *Nurasmira* (as set out above) were repeated and relied upon;

(c) reference was made to the appropriate mode of statutory construction to be adopted, relying, inter alia, on *Tan Kim Chuan & Anor v Chandu Nair* [1991] 2 MLJ 42; [1991] 1 CLJ Rep 441; *Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69 and *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449. The thrust of the submission was that where the words in a statute are plain and unambiguous it is not the function of the court to add words or depart from the clear meaning accorded by the Legislature;

(d) the judicial powers of the High Court are provided in art 121 of the FC and *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 was relied on to comprehend the specific jurisdiction and powers of the High Court; Pursuant to ss 23 and 25 of the CJA the only jurisdiction and powers that could be exercised by the court is under ss 7 and 8 of the CLA. Therefore, damages could only be awarded within the four corners of the CJA;

(e) exemplary damages ought not to have been awarded because the factual matrix of Chandran's case did not warrant or justify the grant of punitive damages, unlike *Kugan*'s case, where there was actual violence inflicted on the deceased. Here, it was contended, the facts disclosed only negligence. That was not sufficiently outrageous to warrant the grant of exemplary damages; and

(f) the High Court had granted exemplary damages following *Kugan*'s case in the Court of Appeal, where it was held that exemplary damages could be granted for the breach of a constitutional right. The decision of this court in *Nurasmira* (which encompassed *Kugan*'s appeal as well) had not been handed down, and accordingly the High Court decision was wrong.

The respondent's submissions

[25] The respondents submitted that:

(a) the jurisprudence for the award of exemplary damages was examined in the decisions of the Court of Appeal in *Kugan*'s case, *Nurasmira Maulat bt Abd Jaffar & Ors v Ketua Polis Negara & Ors* [2015] 3 MLJ 105, *Ketua Setiausaha Kementerian Dalam Negeri dan lain-lain lwn Ghaur Chandram a/l Murugesu (mendakwa bagi pihak diri sendiri dan kesemua orang tanggungan sebagai bakal pentadbir sah harta pusaka Uthayachandran a/l Ghaur Chandram) dan satu lagi rayuan* [2016] MLJU 1716; [2016] 3 CLJ 210 and *Zulkiply bin Taib & Anor v Prabakar a/l Bala Krishna & Ors and other appeals* [2015] 2 MLJ 607; [2015] 2 CLJ 766. It was submitted in essence that Chandran's estate was entitled to claim exemplary damages as a consequence of the acts of the appellants who had deprived him of medical treatment deliberately and as such were guilty of 'oppressive, arbitrary and unconstitutional conduct';

(b) the High Court had not committed any appealable error in that the learned judge had examined the totality of the applicable case law then available and had proffered his reasons for preferring the jurisprudence laid down in *Kugan*'s case. At the time in the Court of Appeal, in both *Kugan*'s case and *respondent*'s case had determined that exemplary damages could be awarded with respect a breach of constitutional rights and public misfeasance;

(c) the Court of Appeal case of *Ghaur Chandran* which was decided in 2016 was per incuriam because both *Kugan*'s case and *Nurasmira Maulat*'s case (at the Court of Appeal level) had not been considered. A breach of the deceased's constitutional rights did not appear to have been taken up;

(d) if s 8(2) of the CLA is read to prohibit exemplary damages for breaches of constitutional rights and public misfeasance causing death, then one is faced with a bizarre situation. This is because when death ensues the wrongdoer 'escapes' liability for exemplary damages while an injury would allow for such liability to be imposed. The message the law would appear to be sending out is that it is better to kill than to just injure. That in itself goes directly against the rationale for the grant of exemplary damages;

(e) in *Nurasmira Maulat* the Court of Appeal referred to the position in India in for example *DK Basu v State of West Bengal* (1997) 1 SCC 416 and a series of other cases, including *Nilabati Behera v State of Orissa* 1993 AIR 1960; 1993 SCR (2) 581 where it was held that when the right to life under art 21 of the Indian Constitution (which is equivalent of our art 5(1) of the FC) was infringed, the courts had the

jurisdiction, and were bound to, offer redress in the form of declarations as well as monetary compensation. As such the jurisprudence relating to the grant of exemplary damages for the breach of the constitutional right to life had been laid down; and

(f) reference was made to the decision of this court in *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141; [2018] MLRAU 213 where exemplary damages were awarded to register the court's disdain of law enforcement officers disregarding the rules and procedures that determine the parameters of their duties and responsibilities which and resulted in a serious violation of an individual's dignity and deprivation of his constitutionally guaranteed freedom. This court approved the guidelines for the grant of exemplary damages as stipulated by James Foong J (as he then was) in *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337; [1996] 1 MLRH 548: ' While considering the request for exemplary damages, this court must bear in mind that the objective for an award under this category is to punish the defendants and to display the court's indignant attitude towards the acts committed by the defendants'. Relying on *Rookes v Barnard and others* [1964] AC 1129 it was held that damages were restricted to situations where there are '... oppressive, arbitrary or unconstitutional acts by the servants of the Government'.

MY ANALYSIS OF THE APPEAL BEFORE THIS COURT

Section 8(2) of the CLA

[26] The appellants before us seek an answer in the affirmative to the question of law posed, particularly on the basis of the majority judgment in *Nurasmira.* In other words, the appellants maintain that s 8(2) of the CLA amounts to an absolute bar against the grant of exemplary damages in a case such as the present, which deals with a custodial death.

[27] It is true to state in relation to s 8(2) of the CLA that the provisions are clear that *exemplary damages are barred and cannot be granted under the CLA.* In this context it is important to appreciate that a claim made under *ss 7 and 8 CLA is a private law action in tort brought against persons who have caused the death of the deceased due to a wrongful act or by neglect or by accident.*

[28] It is not tenable to construe s 8(2) of the CLA otherwise than as it expressly stipulates, as the language is clear and incapable of a construction other than that which it states. *And that is that exemplary damages are not available to the inheritors of the estate of the deceased, notwithstanding that the acts or omissions giving rise to the death of the person were deliberate, vicious and irreversible. However, the answer does not end there.*

[29] The conclusion that exemplary damages are not available under s 8(2) of the CLA is not a complete answer because it relates to a question of law framed *solely under the CLA. Such an answer would be inchoate without an examination of whether Chandran's executors are entitled to bring an action in public law for the contravention of his right to life under art 5(1) of the FC.*

[30] *This is so because of the express finding of the High Court that this constitutional right had been infringed. And that finding was both valid and sound in view of the fact that there is an express pleading in the alternative to the effect that Chandran's constitutional right to life was infringed. Accordingly, a remedy was sought.*

Does the construction afforded to s 8(2) of the CLA preclude a claim for redress for, inter alia exemplary damages for the infringement of art 5(1) of the FC?

[31] In *Nurasmira* the majority of this court held that there was no other redress for a citizen, such as *Kugan*, whose constitutional rights had been infringed. The reasoning has been set out above.

[32] I am, with the greatest of respect, unable to concur with the legal reasoning adopted there. It is with considerable regret that I register my dissent as a departure from the majority decision of this court is not lightly nor easily made. I only do so after deep deliberation because the subject matter of consideration is of the utmost gravity, relating to the constitutionally guaranteed fundamental right to life. To a considerable extent I do concur with the coherently reasoned dissent in *Nurasmira*. However, I depart from the dissent in one area, which to my mind is material.

The issue for consideration: Can the administrators bring an action for a breach of Chandran's constitutional right to life under art 5(1) of the FC?

[33] I am of the view that the contravention of a constitutional right as embodied in art 5 of the FC, resulting in the loss of life, confers a public law right or cause of action available to the executors of the deceased or the inheritors of the deceased's estate, against the perpetrators of the wrongful acts or omission. Put another way, the fact that Chandran a/l Perumal's life was taken otherwise than in accordance with law as prescribed in art 5 of the FC, affords his estate a public law cause of action for the breach of his constitutional right to life.

[34] This was not fully articulated in the dissenting judgment in *Nurasmira.* The entitlement to exemplary damages for the contravention of a constitutional right was sought to be brought under s 8 of the Civil Law Act. To my mind, such a claim cannot be brought under the Civil Law Act, but redress

can be obtained in public law for the contravention of art 5(1) of the FC. To that extent only, I take a different stance from the dissenting judgment in *Nurasmira*.

[35] In the instant case, the learned judge in the High Court found that the appellants had perpetrated a wrong which amounted to a contravention of art 5(1), in that the deceased's right to life was taken away otherwise than in accordance with the law. In these circumstances, it appears to me that the pivotal issue in the instant case is to ascertain whether *the only right or remedy available to the executors of Chandran's estate and his inheritors is the private law remedy in tort, or whether the inheritors are also entitled to a right of action for the infringement of a fundamental right, namely art 5(1) of the FC, as well as the commensurate remedy for such infringement.*

[36] It is also important to determine whether the right to pursue a remedy for the constitutional infringement of a fundamental right is without prejudice to any other action available in respect of the same matter, which may be lawfully available.

[37] In other words, can the inheritors bring an action both in private law under ss 7 and 8 of the CLA as well as for a *breach of a constitutional right under the FC*? In the latter case, where does the remedy lie?

[38] It is necessary in this context to draw a distinction between:

(a) a claim in private law and the attendant remedies available, under ss 7 and 8 of Part III of the CLA; and

(b) a claim in public law for a remedy for the contravention of a fundamental liberty namely art 5(1) which is guaranteed under the FC.

[39] It is certainly clear that there is a distinction between the liability of the State which arises in respect of the breach of a fundamental right under the FC, occasioned by its agents or servants on the one hand, and the liability in private law in tort which provides for the payment of compensation as statutorily provided for in ss 7 and 8 CLA.

[40] Therefore, when reliance is placed on *Sambu Pernas,* as was done by the majority decision of this court in *Nurasmira,* it is indeed good authority for the proposition that no claims can be brought by a deceased person save as provided for in Part III of the CLA in ss 7 and 8. However the claims there refer to civil claims brought within the private law sphere of tort law. *Sambu Pernas* does not touch on a cause of action premised on the infringement of a fundamental right under the Federal Constitution.

[41] The further point that warrants consideration is that ss 7 and 8 of the CLA, are statutory provisions mirroring the developments under the common law, much like the position in the United Kingdom. As outlined in detail in *Nurasmira,* it was only with the introduction of statutory law, that the common law position that all causes of action cease or die with the deceased, could be alleviated. This has considerable benefit for the purposes of enabling the estate or inheritors of the deceased person to bring an action in tort, in private law.

[42] However, these statutory provisions do not deal with claims for constitutional infringements. The CLA is primarily for the purposes of procuring a private law remedy in tort. The reliefs afforded are primarily compensatory in nature. The award of exemplary or punitive damages is not envisaged. The fact that servants of the State and thereby the State, are held liable, and are required to pay compensation in accordance with the CLA, in no way detracts from the fact that such claims are brought in tort and NOT for constitutional infringements.

The differences between the United Kingdom and Malaysia in the context of the issues raised by this appeal

[43] In the United Kingdom, there is no written constitution, and they are governed by the doctrine of Parliamentary sovereignty, unlike us. We have a written constitution and are governed by the doctrine of Constitutional supremacy. Part II of the FC sets out the fundamental rights available to every citizen in the land. When such rights are breached, it follows that the citizen is entitled to redress for such infringement.

[44] This is not to say that there is no such redress for persons in the United Kingdom. As is clear from *Ashley,* Lord Scott of Foscote made the clear distinction between compensatory damages for death as a consequence of accident, wrongful act or neglect, on the one hand, and vindicatory damages where there has been aggravated misconduct and misbehaviour by the State through its servants or agents, for example the police.

[45] Relying on the Privy Council decisions in *Ramanoop* and *Merson*, he explained the fundamental distinction between compensatory damages which serve purely to compensate for the loss suffered, and other types of damages such as exemplary damages, which serve to punish for arbitrary, oppressive or unconstitutional conduct (see *Rookes v Barnard and others* [1964] AC 1129) and vindicatory damages, which enable the person wronged to be vindicated and allowed to continue with his life without fear or pressure.

The decision of the Court of Appeal in Kugan's case

[46] It was, to my mind, in this context, that the Court of Appeal, speaking through David Wong FCJ (later CJSS) in *Kugan*'s case, relied on *Ashley* to contend that there was a distinction between the damages available in tort on the one hand, and exemplary damages available for the infringement of a constitutional right, on the other.

[47] But, this court took the view that the Court of Appeal had misconstrued *Ashley* because Lord Scott of Foscote spoke of *vindicatory* and not *exemplary* damages.

[48] However, the underlying principle in *Ashley* is that there is a distinction between damages which are purely compensatory and awarded for the loss suffered by reason of tortious conduct, as compared to exemplary or vindicatory damages which serve a purpose other than pure compensation for loss suffered by reason of the tortious conduct. This latter category of damages either punishes or vindicates the victim or his inheritors by reason of the misbehaviour or aggression, violence or gross neglect of the aggressor.

[49] Vindicatory damages were indeed contemplated in *Ashley* as an appropriate form of damages to be awarded where there is a violation of the aggrieved person's fundamental or constitutional rights.

[50] It was in this context that the Court of Appeal sought to draw a parallel between *Kugan*'s case, where exemplary damages were sought for a breach of his constitutional right of life, and *Ashley* where Lord Scott recognised that damages were available for conduct that was wrongful, either oppressive or unconstitutional warranting exemplary damages or conduct that amounted to misbehaviour or gross neglect which warranted the grant of vindicatory damages. It was this recognition of a right to punitive or vindicatory damages as opposed to purely compensatory damages that is the true principle to be drawn from Lord Scott's speech, in my respectful view.

[51] I am of the further view therefore that the Court of Appeal in *Kugan*'s case, did not utilise *Ashley* as authority for the proposition that exemplary damages are available for the breach of a constitutional right per se. Instead it was used to differentiate between the basis for the claims of damages, whereby ss 7 and 8 of the CLA provided the basis for a claim for damages which are purely compensatory in nature, while the infringement of *Kugan*'s right to life under art 5(1) of the FC gave rise to the basis for a claim for a different form of damages, namely punitive damages in the form of exemplary damages.

[52] To my mind therefore, the Court of Appeal ought not to be faulted for relying on *Ashley* to draw that distinction. The fact that the type of damages awarded were vindicatory damages, rather than exemplary damages, does not detract from the principle.

The distinct causes of action in Chandran's claim requiring different redress

[53] Returning to the appeal at hand, it is evident from a perusal of the statement of claim that it is premised on ss 7 and 8 of the CLA followed by a claim in the alternative or cumulatively for redress for the infringement of a constitutional right. It is true that it only comprises one paragraph, but the legal basis for such claim is premised on the factual matrix as pleaded in full in the preceding paragraphs of the claim.

[54] In other words, there is a claim under both the CLA as well as a plea of a breach of a constitutional right. These are two separate and distinct claims.

[55] I am of the view that in as much as there is a distinction between the basis for the claims made by Chandran's executors, one being in public law for the breach of a fundamental right under the FC, and the other in private law in tort under ss 7 and 8 of the CLA, the *redress or remedies too are distinct and separate, and are awarded on different bases to serve different purposes.*

[56] We are well acquainted with the private law remedy under the CLA, which is entirely compensatory in nature, and accordingly bars all forms of damages which are punitive or vindicatory. The latter two categories of damages, namely exemplary and vindicatory damages are non-compensatory. Therefore, the basis for a claim under the relevant sections of the *CLA are purely as specified there and are compensatory in nature. There is no provision for punitive, aggravated or vindicatory damages.*

[57] The claim for the *breach of a fundamental right under the FC* seeks a remedy which is different from that under the strictly circumscribed, private law remedies in tort as established in ss 7 and 8 of the CLA.

[58] The right to life in art 5(1) of the FC is a fundamental right. When such a legal right is created and guaranteed by the Federal Constitution, it is a right which is secured by the supreme law of the land, the Federal Constitution. Accordingly breaching that fundamental right gives rise to a cause of action against the party occasioning such loss or injury.

[59] The fact that there subsists a basis or cause of action for the breach of a constitutional right appears to be implicitly accepted by the majority decision in *Nurasmira.* The thrust of the decision in that case was that while there had

been an infringement of the constitutional right to life under art 5(1) of the FC, there was no remedy available for such infringement. A

[60] It is important to bear in mind that in the instant case there comprised both a plea of an infringement of a constitutional right, and an express finding by the trial judge that an infringement of Chandran's constitutional right to life under art 5(1) had been infringed. As such, the existence of such a basis for a claim for redress was not doubted. B

[61] For clarity, the elements of a claim for a breach of a constitutional right require the following elements: C

(a) the assertion or plea that the plaintiff suffered an infringement of a constitutional right; preferably, the specific constitutional right should be identified;

(b) the person or persons who deprived the plaintiff of such right were acting under or for the State; and D

(c) as a consequence of such acts or omissions the plaintiff suffered or lost the right constitutionally *guaranteed.* E

Is there redress for the Infringement of a constitutional right under art 5(1) of the FC?

[62] The next question or issue that arises for consideration is whether there is in fact provision for such redress, given that there is no express provision for remedies or redress in the Federal Constitution itself, unlike the Constitutions of India, Trinidad & Tobago and the Bahamas. The majority in *Nurasmira* held that there was simply no other recourse for the infringement of a fundamental right, save for the private law remedy circumscribed in ss 7 and 8 of the CLA. F G

[63] Are the courts in Malaysia helpless to grant relief in a case of an infringement of the right to life, resulting in the death of a person? That too, when there is at all times an obligation on the part of the State to ensure that there is no infringement of the inalienable right of a person to life in accordance with law, particularly when he is in the custody of the State. The appellants as policemen, were under a duty to safeguard the life of the deceased, at the very least, whilst under their protection and care. H

[64] It appears to me to be untenable to tell the inheritors of a victim of custodial death that their sole recourse in respect of the victim's death, is that of the ordinary remedy of a civil suit under ss 7 and 8 of the CLA, with no recourse whatsoever to any other relief in respect of the violation of the victim's constitutionally guaranteed right to life under art 5(1) of the FC. I

[65] With respect, the decision in *Nurasmira*, *which precludes redress for the infringement of a fundamental right, effectively reduces the right to life enshrined in art 5(1) of the FC, to a mere illusion.*

[66] It amounts to stating that the inheritors of Chandran's estate cannot get any relief against the State under public law in respect of the violation of the right to life. When extrapolated, it means that the courts have no jurisdiction to provide redress and are powerless to do anything but wring their hands in despair when there is deliberate, wrongful and repetitive infringement of the most fundamental right of the citizenry, namely the right to life, by instruments or representatives of the State, for whom the State is vicariously liable.

[67] The need for the guarantee of a right of redress for the violation of a substantive fundamental right like the right to life cannot be denied. Even in the United Kingdom where there is no written Constitution, Dicey demonstrated that abstract declarations of the rights of man are of little value unless there are definite means for the enforcement of such rights when they are violated b y the State or its officials. In Dicey's celebrated words:

> ... The Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty' (see Dicey: 10th Edition, p 197ff — see Constitutional Remedies And Writs *Volume 1, Fourth Edition by Durga Das Basu).*

Schedule 1 to para 25 of the Courts of Judicature Act 1964

[68] As such all modern charters of rights, including the Federal Constitution relating to fundamental rights of the individual, therefore provide for a remedial right for the enforcement of the substantive rights guaranteed under Part II.

[69] The majority decision in *Nurasmira,* to my mind, with the greatest respect, does not represent the position in law under the FC. I am constrained to depart from the majority decision in *Nurasmira* because there is, in point of fact, a remedy available to be exercised by the Judiciary under para 1 of the Schedule to s 25 of the Courts of Judicature Act 1964 ('the CJA'). It provides as follows:

> Powers to issue to any person or authority direction, orders or writs including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others *for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.*

[70] The remedy for the enforcement of chartered or fundamental liberties may be provided for in the written Constitution itself or in the ordinary law. In

Malaysia, the remedy is expressly provided for in the CJA, as set out above. Given the existence of a clear remedy it is incumbent on the courts of the country to avail themselves of these remedies and afford redress to individuals or groups who establish an infringement of such fundamental rights such as the right to life.

[71] Part II of the FC refers to the fundamental liberties of which the right to life under art 5(1) of the FC, is arguably the most important human right, comprising not only the right to live, but also the right to liberty and a non-exhaustive list of rights, all related to the right to live with human dignity.

[72] To my mind therefore, it is not accurate to conclude without more, that there is no manner of redress available for the inheritors of the estate of Chandran in respect of his death as a consequence of the deliberate and wrongful neglect by the servants of the State, namely the appellants.

[73] It is true that our Federal Constitution, unlike the Constitutions of India, Trinidad and Tobago and the Bahamas, does not contain an express provision within it stipulating the manner of seeking redress for such a constitutional right. Nor does it expressly stipulate the express remedies or redress available for the infringement of a fundamental right.

[74] In India, there is express provision in the Indian Constitution in arts 32 and 226, both for the mode and type of redress. In point of fact, s 226 of the Indian Constitution and Schedule 1 to para 25 of the CJA mirror each other in terms of the available reliefs. They are in pari materia.

Does the fact that the redress is stipulated in the CJA and not the FC, render such provisions ineffective?

[75] Does the fact that the remedies specifically spelt out in the CJA for infringements of Part II of the FC are not expressly stipulated in the FC, render those remedies nugatory or preclude them from being utilised for precisely that purpose?

The answer must be a resounding no.

[76] The difference between the FC and the constitutions of the other Commonwealth jurisdictions referred to above, lies largely in the *mode of enforcement of an infringement* of such fundamental rights and liberties. In those jurisdictions, where the mode of seeking redress and the types of redress available are expressly set out in their respective Constitutions, aggrieved citizens or their inheritors may apply directly to their respective apex courts for the reliefs sought.

A [77] In India for example, a writ petition may be issued directly to the Indian Supreme Court (see *Nilabati Behera v State of Orissa* 1993 AIR 1960; 1993 SCR (2) 581 ('Nilabati Behera').

B [78] In *Nilabati Behera*'s case for example the distressed mother of the deceased who had died in custody, simply wrote a letter to the Indian Supreme Court, who treated the letter as a writ petition for relief.

C [79] Prior to that, in the renowned case of *DK Basu v State of West Bengal* (1997) 1 SCC 416 the Supreme Court of India held that the use of torture to extract information from a person held in police custody amounted to a contravention of art 21 of the Indian Constitution. Article 21 of the Indian Constitution is similar to art 5(1) of the FC. In that case, the court held:

D > Such a crime-suspect must be interrogated-indeed subjected to sustained and scientific interrogation determined in accordance with the provisions of law. He can't however , be tortured or subjected to third-degree methods or eliminated with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc.

E [80] The Supreme Court of India went on to grant compensation on basis of a constitutional infringement of fundamental rights guaranteed under the Constitution, and its duty to enforce such fundamental rights under arts 14, 21 and 32 of the Indian Constitution.

F [81] In our jurisdiction, the availability of this relief is in the CJA. The fundamental liberties are set out in Part II of the FC. This means that every High Court has the juris diction and po wer to afford relief to any citizen who has suffered from an infringement of his fundamental rights as set out in our charter of fundamental rights in the FC. Where death has ensued as a G consequence of such infringement, the deceased's inheritors or his estate and his beneficiaries may similarly seek recourse. Chandran's executors may therefore seek recourse under the CJA for the infringement of his right to life under art 5(1) of the FC.

H [82] Remedies form an integral part of our guaranteed fundamental rights in the FC. As rightly stated by Zainun Ali FCJ in Her Ladyship's dissenting judgment, there can be no right without redress. Otherwise the aggrieved and disadvantaged would be left with a series of lofty ideals with no way nor hope of enjoying such illusory rights. Ultimately justice would not be served. To that I extent, rights and remedies are inextricably interwoven.

The Reid Commission Report 1957

[83] Support for this proposition comes from as far back as the Reid Commission Report 1957 ('Report') where in relation to the fundamental liberties, the following parts are relevant:

> *CHAPTER IX — FUNDAMENTAL RIGHTS*
>
> *Constitutional Guarantees*
>
> 161. *A Federal constitution defines and guarantees the rights of the Federation and the States: it is usual and in our opinion right that it should also define and guarantee certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life.* The rights which we recommend should be defined and guaranteed are all firmly established now throughout Malaya and it may seem unnecessary to give them special protection in the Constitution. But we have found in certain quarters vague apprehensions about the future. We believe such apprehensions to be unfounded but there can be no objection to guaranteeing these rights subject to limited exceptions in conditions of emergency and we recommend that this should be done. *The guarantee afforded by the Constitution is the supremacy of the law and the power and duty of the Courts to enforce these rights and to annul any attempt to subvert any of them whether by legislative or administrative action or otherwise. It was suggested to us that there should also be written into the Constitution certain principles or aims of policy which could not be enforced by the Courts. We do not accept this suggestion. Any guarantee with regard to such matters would be illusory because it would be unenforceable in law and would have to be in such general terms as to give no real security.* Moreover we do not think that it is either right or practicable to attempt to limit developments of public opinion on political, social and economic policy.
>
> 162. *Our recommendations afford means of redress readily available to any individual, against unlawful infringements of personal liberty in any of its aspects. We recommend provisions against detention without legal authority of a magistrate, slavery or forced labour (but not against compulsory service) which apply to all persons; and provisions against banishment, exclusion from the Federation and restriction of freedom of movement which apply only to citizens of the Federation.* (Emphasis added.)

[84] By way of summary the report recommended, inter alia, as follows:

> *Judiciary*
>
> 54. *The present Supreme Court should be continued and should have the functions of* interpreting the Constitution and *protecting state rights and fundamental liberties* in addition to its ordinary functions (paragraph 123). (Emphasis added.)

[85] The Supreme Court referred to the superior courts comprising the High Court, the Court of Appeal and Supreme Court, to be established as comprising the independent judiciary:

Fundamental Rights

70. *Fundamental rights should be guaranteed in the Constitution and the courts should have the power and duty of enforcing these rights*. The rights guaranteed should be freedom from arrest and detention without legal authority, freedom from slavery or enforced labour and should include provisions against banishment and restriction of freedom of movement of citizens. Freedom of speech should be guaranteed to all citizens subject to the interests of security, public order or morality and freedom to profess, practise and propagate religion should also be guaranteed (paragraph 162). (Emphasis added.)

[86] As can be seen in Chapter XII of the report containing the summary of recommendations, it was specified that *fundamental rights be guaranteed and that the courts had the jurisdiction, power and duty to enforce these fundamental rights.*

Redress for infringements of fundamental rights was clearly stipulated and provided for in the FC

[87] It is equally evident that the duty of enforcing the fundamental rights in Part II of the Constitution fall upon the Judiciary. This is apparent from the doctrine of the separation of powers, as an incursion by the Legislature or the Executive can only be regulated by the Judiciary for the purposes of ensuring that the provisions of the FC are not contravened. The jurisdiction and power to do so is not in issue as that is a fundamental tenet of a constitutional supremacy to which we subscribe. It is in keeping with the rule of law.

[88] The mode of redressing such incursions, and the form in which such redress can be given, is set out in federal law, more specifically Schedule 1 to para 25 of the CJA setting out the *'additional powers' of the High Court for the purpose of enforcing fundamental rights*. Therefore it cannot be clearer that the High Court, and as such, this apex court has the jurisdiction and the power to afford such remedies as it deems fit to afford redress in the face of the infringement of a fundamental right.

[89] Therefore, contrary to the reasoning in *Nurasmira*, with respect, the lack of a constitutional remedy within the FC did not reduce or abrogate the powers of the courts to provide redress for infringements of constitutional rights.

[90] Certainly the absence of express stipulations did not result in an inability to enforce the fundamental rights in Part II of the FC. On the contrary, it allowed the courts to give any relief or order it considered appropriate in the circumstances of a case, by reason of the broad range of remedies available in Schedule 1 to para 25 CJA. That would include damages

or compensation, a declaration or no order at all. It all lay in the hands of the Judiciary enforcing such infringement. A

[91] In the final analysis therefore the courts are not helpless to grant relief in a case of violation of the right to life. This has been made clear in *R Rama Chandran v Industrial Court of Malaysia & Anor* where Edgar Joseph Sr FCJ gave emphasis to the nature and effect of the remedies envisaged in Schedule 1 to para 25 CJA. They are primarily public law remedies. He held that '... our courts are at liberty to develop a common law that is to govern the grant of public law remedies based upon our own legislation. They may of course, be guided by the decisions of courts of a jurisdiction which has an analogous provision. But ultimately, they must hearken to the provisions of our written law when determining the nature and scope of their powers'. Quoting from *Nilabati Behera* the learned judge approved and accepted this decision of the Supreme Court of India. B C D

[92] In *Nilabati Behera*, Verma J (later CJ of India) quoted in turn from the Bhagalpur blinding cases: *Khatri and Ors v State of Bihar* (1981) 1 SCC 627 where it was said that a court is not helpless to grant relief in a case of violation of the right to life and personal liberty and that it should be prepared to 'forge new tools and devise new remedies for the purpose of vindicating these fundamental rights'. E

[93] The Indian Supreme Court concluded in *Nilabati Behera* that in order to ensure complete justice in the enforcement of constitutional rights, the award of monetary compensation was appropriate in specific cases, particularly where that was the only mode of redress available. If that were not so, and monetary compensation was not available, then it would not merely render the court powerless, and the constitutional guarantee a mirage, but might in certain situations, be an incentive to extinguish life. F G

[94] That would be so, it was held, if for the extreme contravention of causing the loss of life, the court is powerless to grant any relief against the state save by way of the ordinary private law cause of action in tort, and recovery of limited damages by the ordinary process. H

Enforcing the fundamental rights under the FC in this jurisdiction

[95] Our FC features an effective 'bill of rights' in the form of Part II of the FC, like other jurisdictions with developed legal systems, like India, the United States, Ireland, Canada and South Africa. Some of these jurisdictions, like Canada and South Africa, only enjoyed such rights long after we did. Our fundamental rights in Part II of the FC are testament to this, having been in existence since at least Merdeka. I

[96] All these jurisdictions guarantee the enforcement of such rights. So does our Federal Constitution. Therefore, for the constitutional guarantee of a right to life to be real, the mode of redress for any infringement must be, and is indeed available in public law.

[97] *That such fundamental rights and a means of enforcement of the same subsist, is all the more important for those citizens who do not have the means, due to poverty or a lack of knowledge or education, or the general 'wherewithal' to enforce their rights in private law. In short, the public law remedy under the Federal Constitution provides access to justice in the fullest sense of the word.*

[98] Having said that however, this right to pursue a remedy in public law under the Federal Constitution must be scrutinised with care by the Judiciary, and judicial restraint should be brought into play to ensure there is no avoidance of private law remedies where they are more appropriate.

[99] The courts should be vigilant to protect the fundamental rights of those in custody to ensure that they are not subject to custodial violence, but should be equally vigilant to ensure that falsely motivated and frivolous claims are rejected. This is in the interests of society and to enable the police to discharge their duties fearlessly and effectively. In this context the balance to be achieved should be clear from:

(a) an analysis of the evidence adduced in support of the claim of the infringement of a fundamental right — where the evidence is not credible, or weak, the basis for the claim will be in doubt;

(b) a consideration of whether punitive or exemplary or vindicatory damages are indeed necessary on the particular facts of a case;

(c) in determining this issue the court will be guided by the twin principles that such compensation will provide some measure of redress for the brutal treatment suffered by the victim of such custodial violence or death and the equally important principle that such monetary compensation serves as a deterrent to signal to the employees of the State that they are being punished for their violation of a constitutional right under art 5(1) of the FC. It should be open to the State to recover the amount of compensation from the individual officer or officers concerned in committing the acts or omissions concerned;

(d) the quantum of compensation that is suitable should be left to the individual judge to determine in accordance with the facts and circumstances of each case, which vary widely. Such judicial assessment will likely consider factors such as the extent of the infringement which may range from deliberate omissions resulting in injury to health or death, or positive acts of torture or injury; the resultant injury such as

permanent disability or death; any action taken to remedy the wrong inflicted. The list of factors cannot be exhaustive;

(e) a consideration of whether the claim is more properly brought under a private law claim in tort for compensatory damages; and

(f) if an alternative remedy or forum is provided by law, then such remedy should be sought and exhausted rather than seeking recourse for the breach of a constitutional right.

[100] In the present case, given the circumstances of Chandran's death and the impunity with which his life was extinguished, it is certainly a fit and proper case for the executors to have brought an action against the appellants both in private law under tort, as well as in public law for the contravention of his right to life under art 5(1) of the FC. The fact that an action was brought under private law does not, to my mind, preclude the other under public law. *I am fortified in my conclusion by the clear and unequivocal findings of the learned trial judge.*

[101] While the private law cause of action which was made out in negligence, under ss 7 and 8 CLA afforded his estate, and his inheritors some degree of redress, the public law claim for a breach of his constitutional right to life allows his estate to receive redress for the failure of the State, through its servants and agents, namely the appellants, to safeguard this fundamental right. Such damages as were awarded by the High Court were clearly punitive in nature to indicate the court's outrage at the conduct of the appellants, resulting in his unnecessary death (see *A v Bottrill* [2003] 1 AC 449 at 456).

[102] For such failure the State must bear the consequences of the actions and omissions of its servants. In view of Chandran's death, which is both irrevocable and irreversible, the only possible remedy available is monetary redress to his inheritors. As our courts possess the jurisdiction to mould the relief to meet the needs of a particular infringement, so as to provide the appropriate remedy, (see *Ramachandran* above), I am of the view that the appropriate relief is as detailed by the learned High Court judge, namely punitive or exemplary damages in the sum the court determined, of RM200,000.

THE QUESTION OF LAW IN THIS APPEAL

[103] Turning to the question of law posed before us namely:

> Whether section 8(2) of the Civil Law Act 1956 [Act 67] is an absolute bar to the award of exemplary damages in an estate claim?

[104] I answer the question in the affirmative. However, I go on to state that merely answering in the affirmative does not, in itself, afford a complete answer to the question for the following reasons:

(a) although exemplary damages are not available to Chandran's estate under this private law cause of action framed in tort under ss 7 and 8 CLA, such damages are available on the present factual matrix, to his estate under his claim premised on the infringement of his constitutional right to life un der art 5(1) of the FC. The latter claim is a public law claim based on the FC and for which redress is available under the provisions of the CJA;

(b) Chandran's estate was entitled, on the facts of the present case to bring both a private law claim in tort under the provisions of the CLA and a public law claim under the FC for the infringement of a fundamental right. They are distinct and separate claims;

(c) there is redress available for the infringement of a fundamental right under art 5(1) of the FC. It is expressly detailed under Schedule 1 to para 25 of the Courts of Judicature Act 1964 which stipulates that the remedies set out there are for, inter alia, the purpose of enforcing fundamental rights under Part II of the FC; and

(d) applying the decision of this court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1996] 1 MELR 71; [1996] 1 MLRA 725 per Edgar Joseph Sr FCJ it follows that this court may mould the relief required to compel observance of this constitutional right. In the instant case a declaration, which is often the public law remedy sought and granted, would not afford sufficient or appropriate relief. Chandran is dead. Therefore, given the arbitrary, oppressive and unconstitutional conduct of the appellants as servants of the State (all hallmarks of the basis on which be grant exemplary damages in *Rookes v Bernard*), the appropriate relief is monetary compensation payable to Chandran's estate. It is said by the majority that exemplary damages cannot granted because the victim is dead. Aggravated damages are compensatory damages awarded to a victim of a wrong for mental distress or injury to feelings by reason of the manner in which the defendants committed the wrong. Such damages are awarded to the victim of the wrong. But the victim here is dead. Therefore if it is said that exemplary damages cannot be awarded because the victim is dead, then the same rationale would apply in relation to aggravated damages too. But that is not a correct proposition of law, with respect. It is a fallacy to state that such damages are only available to the victim, if he is alive. Where the victim has been killed as a consequences of wrongful acts like Chandran, his estate is entitled to receive the damages, be it exemplary or aggravated damages for a breach of the constitutional right to life under art 5(1) of the FC. The High

Court's assessment and grant of exemplary damages in the sum of RM200,000 is cogently reasoned and is affirmed.

[105] For these reasons, which differ from the reasoning of both the High Court and the Court of Appeal, I have no hesitation in dismissing the appeal with costs.

Rhodzariah Bujang FCJ (delivering majority judgment of the court):

[106] The appellants in this appeal were sued by the respondents, the joint administrators of the estate of one Chandran a/l Perumal ('the deceased') and who were his wife and daughter, respectively. The suit was filed following his demise on the fifth day whilst in police custody pursuant to his arrest, with three others, on suspicion of kidnapping a newborn baby. As found by a coroner, following an inquest into his death, the deceased died of hypertensive heart disease and the claim put forth by the respondents was for losses suffered by his estate and lawful dependants by reason thereof which they alleged was due to the wrongful acts of the appellants. After a full trial the learned High Court judge ('HCJ') found for the respondents and awarded the following damages against the appellants:

(a) special damages — RM3,500;
(b) bereavement — RM10,000
(c) loss of dependency — RM144,000;
(d) exemplary damages — RM200,000; and
(e) cost — RM50,000.

[107] The appellants were only dissatisfied with the decision in respect of the award of exemplary damages and filed an appeal to the Court of Appeal in respect of it but which appeal was dismissed. The appellants sought and was granted leave by this court to appeal against the said decision on this sole question of law:

> Whether section 8(2) of the Civil Law Act 1956 [Act 67] is an absolute bar to the award of exemplary damages in an estate claim?

[108] Given the legal poser before us and the fact that liability was not in dispute before the Court of Appeal and now us, it would not be necessary in this judgment of mine to dwell at length on the circumstances upon which the learned HCJ fastened liability on the appellants, except to say that the demise of the deceased was directly attributable to the failure of his custodians to give him proper medical care and attention which was warranted by his pre-existing medical condition. It is also stated in the post-mortem report that the deceased had not eaten any food for the pathologist found that his stomach was empty.

A This is of course another damning evidence in support of the finding of liability against the appellants.

CASE PRECEDENTS

B **[109]** As submitted by the learned Senior Federal Counsel ('SFC') acting for the appellants, this was not the first time that this court had been tasked to answer this question for in *Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals* [2018] 3 MLJ 184 ('*Kugan*'s C case'), a similar question in the following words was posed for this court's determination:

> Whether section 8(2) of the Civil Law Act 1956 (Act 67) which bars the awarding of exemplary damages in an estate claim is applicable where the death of the deceased is as a result of a breach of his constitutional right to life?' [page 40 of the Kugan's (Appeal No 52)]

D

[110] As stated in the report, Kugan died of acute renal failure after being tortured and beaten to death whilst also in police custody and the High Court E awarded RM300,000 against the appellants for exemplary damages which the Court of Appeal affirmed. However that award was set aside by a majority decision of this court penned by Zaharah Ibrahim, FCJ. The minority decision was delivered by Zainun Ali FCJ.

F **[111]** Before going further into the reasonings of *Kugan* case, it is best that I reproduce the aforesaid s 8 and the relevant sub-sections below:

> 8 Effect of death on certain causes of action.
>
> (1) Subject to this section, on death of any person all causes of action subsisting G against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:
>
> Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain part from the other or to any claim for damages on the ground of adultery.
>
> H (2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person —
>
> (a) shall not include any exemplary damages, any damages for bereavement made under subsection 7(3A), any damages for loss of expectation of life I and any damages for loss of earnings in respect of any period after that person's death;
>
> (3) Where damages has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be

deemed, for the purposes of this section, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

...

...

(4) The rights conferred by this section for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by section 7 and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said section as it applies in relation to other causes of action not expressly excepted from the operation of subsection 91).

[112] Zaharah Ibrahim FCJ in Her Ladyship's judgment as did Zainun Ali, FCJ referred to this court's decision in *Sambu Pernas Construction & Anor v Pitchakkaran* [1982] 1 MLJ 269; [1982] 1 MLRA 143 which explained the rationale behind the abovementioned ss 7 and 8 at p 270 of the report as follows:

At common law the death of a person gives rise to two principles. The first is that the death of any person is not a civil wrong. Therefore no action can be founded on it although death may result in pecuniary losses or damages to the deceased's spouse and children. Lord Ellenborough CJ in *Baker v Bolton (3)* ruled that 'in a civil court the death of a human being could not be complained of as an injury'. The second principle was that when a person died any cause of action which was vested either in his favour or against him at the time of death was buried with him. In other words the cause of action did not survive the death: 'actio personalis moritur cum persona'. The first principle which regarded death as not giving rise to any cause of action was rectified by section 1 of the Fatal Accidents Acts 1846 to 1959, popularly known as Lord Campbell's Act whilst the second principle which dealt with the non-survival of the cause of action was rectified by the Law Reform (Miscellaneous Provisions) Act, 1934. The provisions of these two UK statutes are now incorporated in sections 7 and 8 of our Civil Law Act, 1956.

Had it not been for sections 7 and 8 of the Civil Law Act it is clear that the respondent could not have the right to bring the suit, and having acted under these sections and in particular section 7, his case must stand and fall on the basis of these sections.

[113] Zaharah Ibrahim, FCJ further reiterated that:

[191] As was explained by this court in *Sambu Pernas*, causes of action vested in a person survive his death solely due to s 8 of the CLA. Such survival is subject to the conditions set out in that section, one of which is that damages which can be awarded for the benefit of the estate of such deceased person cannot include exemplary damages. As was also stated in *Sambu Pernas*, the claim of a person claiming on behalf of the estate of a deceased person under s 8 must 'stand and fall' on the basis of that section.

[114] In short, Her Ladyship held that the only law available to a claimant suing on behalf of the estate of a deceased person is the Civil Law Act 1956 ('the CLA') and that includes the limitation prescribed by the Act in its s 8. The question posed was therefore answered in the affirmative by Her Ladyship.

[115] Zainun Ali FCJ, on the other hand expressed her contrary view based on the following main reasons. Firstly, following what was held in *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12, the phrase 'in accordance with law' in art 5(1) includes the common law of England in so far as it is in operation in the Federation or any part thereof and that it is accepted in the said law that a victim of constitutional violation has the right to be compensated by an award of punitive, exemplary or aggravated damages. That right, held Her Ladyship 'translates into a right guaranteed under art 5(1) of the Federal Constitution ...' and hence, '... where a wrong is committed by the state or an instrument of the state which has the effect of depriving the victim of his life (in the widest sense as held by this court in *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, in a manner not in accordance with law, the victim is entitled to an award of exemplary or aggravated damages). Thus as in this appeal, the respondent is entitled as a matter of right guaranteed to them by the Constitution, to exemplary or aggravated damages for the deprivation of the deceased's (Kugan's) life'. Her Ladyship's alternative reason for not agreeing with the prohibition on exemplary damages in the said sub-s 8(2) is expressed this way:

> [73] As had been alluded to above, the Civil Law Act 1956 predates the Federal Constitution. Thus it is a pre-Merdeka law or an existing law. It is clear that the section violates the right of the deceased (Kugan) in this case to have, as a matter of constitutional guarantee, an award of exemplary or aggravated damages. Being a pre-Merdeka law and therefore an existing law that is inconsistent with a provision of the Constitution, the duty of this court is to read it in accordance with art 162(6) of the Federal Constitution to bring it into accord with the latter.

[116] Her Ladyship then concluded as follows:

> [78] Taking the above and acting upon the dictates of art 162(6), I would interpret sub-sub-s 8(2)(a) of the CLA as follows, to bring it into accord with the Federal Constitution.
>
> It would thus read:
>
> > Section 8(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person –
> >
> > (a) Shall not include any exemplary damages *save where the cause of action concerns the violation of a right guaranteed by the Federal Constitution*, any damages for bereavement made under subsection 7(3A), any damage for loss of expectation of life and any damages for loss of expectation of life and any damages for loss of earnings in

respect of any period after that person's death;

[79] By reading into para (a) of sub-s 8(2) the emphasised words, the section is brought into accord with the Federal Constitution.

[117] What was held by Her Ladyship above is consistent with what had been said earlier by the Court of Appeal when hearing the appeal respecting Kugan's death (see *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal* [2015] 1 MLJ 353; [2014] 9 CLJ 15) where David Wong Dak Wah, JCA (as His Lordship then was) followed the approach taken by the House of Lords in *Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975 in interpreting a similar provision to our s 8. That provision is s 1(1) of the Law Reform (Miscellaneous Provision) Act 1934 and the claim of the appellant in the cited case was brought under s 1 of the Fatal Accidents Act 1976 which section is similar with our s 7 of the CLA. As noted by this court in *Sambu Pernas*'s case, which I now reiterate, the aforesaid statutory provision is to mitigate the twin principles in common law, which is, firstly, that the death of a person is not a civil wrong and that no action can be founded on it even though his death would have resulted in pecuniary losses or damages to his dependants. Secondly, when a person dies, the cause of action is buried with him: *actio personalis moritur cum persona.* The House of Lords, despite the said prohibition, awarded damages for vindication arising from the death of the unarmed victim, caused by a shot fired by the police during a raid. After reproducing the relevant part of the said judgment, David Wong Dak Wah JCA concluded, inter alia, as follows:

[72] From the grounds of Their Lordships, it is quite clear that they saw no impediment in awarding exemplary damages despite the express prohibition of awarding exemplary damages in an estate claim when they consider that prohibition in the light of fact that the claim of the Ashleys was for damages stemming from a breach of a right provided for in the Human Rights Act 1998 which Act is the consequence of the European Convention for the Protection of Human Rights and Fundamental Freedoms. *His Lordship equated that statutory right to be a constitutional right by virtue of the connection or link between the Human Rights Act and European Convention for the Protection of Human Rights and Fundamental Freedoms. And such equation was done despite the fact that there is no written Constitution in England which practises Parliamentary supremacy.*

[73] As stated earlier, this country practises Constitutional Supremacy and thus any breach of any constitutional right must be jealously guarded by the courts and protected with the severity as it justly deserves. A constitution so to speak is the heart of a country and the blood vessels of the heart are the entrenched rights of every citizen of the country. Any mutilation of those blood vessels must be attended to immediately and with the appropriate measures as any failure to do so would lead to the obvious diagnosis of a weak heart.

[74] That said, we see no reason why we should not adopt the approach of the House of Lords in the circumstances of this case. Accordingly we find that where

there is a breach of a constitutional right by a public authority, s 8(2) of the Civil Law Act does not apply and the courts cannot be barred from awarding exemplary damages. Our view is fortified by the fact that in 1956, the year in which the Civil Law Act was legislated, there was no Federal Constitution.

[75] We further say that the public tort of public misfeasance had not been developed yet in 1956 and it can be said that when the Civil Law Act was enacted, it was only in respect of private tortious actions. Hence we are of the view that s 8 of the Civil Law Act only applies to private torts in so far as the prohibition of awarding exemplary damages. (Emphasis added.)

[118] Certain points in the above dissenting judgment of Zainun Ali, FCJ have been quoted with approval by this court in *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141. Paragraph 125 of the judgment of Balia Yusof Wahi, FCJ reproduced the very same paras 69 and 71 of Zainun Ali FCJ's judgment which I had done earlier and His Lordship stated clearly in his judgment at para 125 thereof that the court subscribes to the same quoted views of Her Ladyship. It is to be noted, however that *Hassan*'s case does not involve an estate or dependant's claim but rather a personal one by the respondent who was assaulted whilst in police custody following his arrest over an alleged involvement in a fight with a policeman which occurred earlier. Both general and specific damages as well as exemplary and/or aggravated damages were claimed by him arising therefrom and he succeeded in his claim in all tiers of the court.

THE APPEAL BEFORE US

[119] The long and short of the submission of the learned SFC before us is that the words of s 8(2) must be given their ordinary meaning as held by this court in the cases cited by him, such as, *Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69 and the Supreme Court in *Tan Kim Chuan & Anor v Chandu Nair* [1991] 2 MLJ 42; [1991] 1 CLJ Rep 441. Based on what the House of Lords said in *Thompson v Goold & Co* [1910] AC 409 as quoted by the Supreme Court in *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449, the learned SFC submitted that we should not read words into an Act of Parliament unless there exist a clear reason to do so as found within the four corners of the Act itself.

[120] The learned SFC submitted further that the High Court's general jurisdiction and powers is defined in art 121 of the Federal Court and its specific ones are in the Courts of Judicature Act 1965. For civil matters, it is ss 23–25 thereof and s 25 specifically provides that it has '... such other powers as may be vested in it by any written law in force within its local jurisdiction'. Therefore, he submitted, in granting damages, the exercise of the court's powers is only within the four corners of the CLA, meaning to say that the prohibition against the award of exemplary damages must be adhered to.

[121] Learned counsel for the respondents, on the other hand contended, before quoting at length the Court of Appeal's decision in *Kugan*'s and *Nurasmira*'s cases which, in essence reiterated the stand on this issue as held by Zainun Ali, FCJ and which I have reproduced above, that:

> Quite apart from that, if Section 8(2) of the Civil Law Act 1953 is read to prohibit exemplary damages for breaches of constitutional rights and public misfeasance causing death, we are faced with a bizarre situation. The worst possible case, ie death, would entitle the wrongdoer to escape liability for exemplary damages. In other words, the law would appear to be sending an outrageous message to those who disregard constitutional right to life — *it is better to kill then to just injure*. This goes directly against the rationale for maintaining exemplary damages. (Emphasis added.)

[122] Before going further into the merits of the arguments canvassed before us, it behoves upon us to point out, with respect, that the statement of learned counsel as emphasised above is a reflection of the law prior to the enactment of s 8 and not post such enactment because s 8 is a mitigation of the rigidity of the dual common law principles which I have stated earlier.

[123] It would not be out of place to state now that our s 8(2) is not unique for there are other jurisdictions which contained a similar prohibition in their written law. That of United Kingdom I had already mentioned . Closer to home is s 10(3) of the Singapore's Civil Law Act (Chapter 43, Revised Edition 1999). Then there is s 3(2) of the New Zealand's Law Reform Act 1936 and those of the States in Australia such as s 16(2) of the Australian Capital Territory's Civil Law (Wrongs) Act 2002 and s 6(1)(a) of the Northern Territory of Australia's Law Reform (Miscellaneous Provisions) Act 1956. It is also pertinent, in the interest of the law, to also mention that, as advocated by the learned author of *McGregor on Damages* (19th Ed), an effort has been made by the Law Commission of United Kingdom for the said statutory prohibition on exclusion of exemplary damages to be repealed but this was rejected by the Government. The rationale behind the move to do away with the prohibition is because it is contrary to the aim of exemplary damages, which is to punish the wrongdoer but who escapes that punishment just because his victim has died. This is of course more so when the wrongdoer is a public servant for as stated by Lord Devlin in the celebrated case of *Rookes v Barnard and others* [1964] AC 1129, unlike ordinary damages whose purpose is to compensate, that of exemplary damages is to punish and deter, and there are two categories of cases when it should be awarded, vis:

(a) oppressive, arbitrary or unconstitutional action by the servants of government;

(b) the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

That prohibition also produced a reverse effect, in that if it is the wrongdoer who died, the victim can claim exemplary damages against his estate which according to the Law Commission's report at para 1.277 would result in unfairness since 'the retributive goal of a punitive award cannot be achieved: only the 'innocent' heirs are punished'.

[124] Stating the obvious, our task in this appeal is simple enough, which is, interpreting s 8(2) whose words are plain and unambiguous. The process of that interpretation, however is not equally so, for as elucidated by Zainun Ali, FCJ in *Kugan*'s case, our CLA is a pre-Merdeka law, which means that constitutional right to life under art 5(1) of the Federal Constitution was not in the contemplation of the legislature when the CLA, specifically when s 8(2) was enacted. Nevertheless, the legal principle governing statutory interpretation is well settled in that where the words of the statute is clear and unambiguous, the court must give effect to its natural and ordinary meaning. The often quoted statement of Lord Reid in *Pinner v Everett* [1969] 1 WLR 1266 at p 1273 on that principle is reproduced below:

> In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of the word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase.

[125] However, as held by the House of Lords in *Nothman v Barnet London Borough Council* [1978] 1 WLR 220 at p 228, the court is permitted to depart from that strict canon of construction when such an interpretation gives rise to an absurd or unjust situation whereupon, the judge can use his 'good sense to remedy it — by reading words in, if necessary, so as to do what Parliament would have done, had they had the situation in mind'.

[126] This advice is to be read with a caution expressed in *Halsbury's Laws Statutes* in Volume 44(1) at para 1487 (Reissue) which was quoted in *Tenaga Nasional Bhd v Pearl Island Resort Development Sdn Bhd* [2017] MLJU 1193; [2017] 9 CLJ 199, that is:

> *'If there is nothing to modify, alter or qualify the language which a statute contain, the words and sentences must be construed in their ordinary and natural meaning.'*

[127] As was decided by this court in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97 giving effect to the intention of Parliament is equally advocated in discharging our interpretative task with a further caution that we must not do so in any way which would produce a result opposite to the legislative intention for that would constitute unauthorised judicial legislation and a breach of the doctrine of separation of powers.

[128] Equally important, if not more so in this case given the fact that the CLA is a pre-Merdeka law, is art 162(6) of the Federal Constitution which provides:

> Article 162. Existing laws.
>
> ...
>
> (6) Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary *to bring it into accord with the provisions of this Constitution.* (Emphasis added.)

[129] Article 162(7) defines modification to include amendment, adaptation and repeal. That is the express power given to the court when it comes to pre-Merdeka law, that is to modify the same when there exist a conflict between the two. To me the invocation of the said power is only when there is an existence of such a conflict is because of the clear intention expressed in the words of the said provision which I have emphasised above for in the absence of such a conflict, there is no reason at all to 'bring it into accord' with our constitutional provisions. In other words, there is a presupposition from the clear wordings of art 162 on the existence of the said conflict before the court's power to modify the existing law can be invoked. Hence the invocation of the said power is only justified when that conflict exists.

The decision of the Privy Council in *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169 is also supportive of our view above when Lord Denning held as follows:

> *In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail.* The court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution. (Emphasis added.)

[130] An example of such a conflict is seen in *Assa Singh v Mentri Besar, Johore* [1969] 2 MLJ 30 where the appellant challenged the constitutionality of the Restricted Residence Enactment 1933, a pre-Merdeka law which the Federal Court held to be inconsistent with art 5(3) and (4) for there was no provision in the Enactment on the rights of a person arrested and detained under it. This moved this court to modify it and read into the Enactment the right of an arrested person to, inter alia, be informed of his grounds of arrest within a reasonable time, be produced before magistrate within 24 hours of such arrest and be defended by a legal practitioner of his choice.

[131] Another example of that conflict is seen in *Kerajaan Negeri Selangor & Ors v Sagong Bin Tasi & Ors* [2005] 6 MLJ 289 where the Court of Appeal held that the word 'may' in s 12 of the Aboriginal Peoples Act 1954 on the aborigines' right to be given compensation when the State Authority acquired their aboriginal land is to be read as 'shall' in accordance with art 13(2) of the

A Federal Constitution which guarantees adequate compensation for compulsory acquisition of a person's property.

[132] Thus, in view of art 162(6) and the aforesaid settled principles on statutory interpretation, the question which we posed to ourselves in order to B answer the legal poser granted in the leave to appeal is this: Is s 8(2) of the CLA incongruous with art 5 of the Federal Constitution? My answer to that is a definite no, for as laid out in *Rookes*'s case in order to be entitled to exemplary damages, the plaintiff himself must be the victim of the punishable behaviour for its object is not to compensate him but to punish the defendant and to deter C him and others in the same shoes or similar position from committing such wrongs. In the words of Lord Devlin in *Cassell & Co Ltd v Broome* [1972] AC 1027 at p 1126:

> *The plaintiff must himself have been the victim of the conduct of the defendant which* D *merits punishment*: he can only profit from the windfall if the wind was blowing his way. (Emphasis added.)

Given that the deceased victim is not suing but his estate is, that condition for exemplary damages is not met in this case.

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[133] Secondly, and most obviously, there is nothing in the Federal Constitution which provides in any direct or vague way, the right of the estate of a deceased to such damages, unlike those constitutional provisions in *Assa Singh*'s case and *Sagong Tasi*'s case. Saying this should not in any way be F interpreted to mean that I am demeaning our constitutional guarantee of right to life and/or condoning the acts of the deceased's custodians in this case for their wrongful actions should indeed be punished. However, the alleged incongruity of the law in this respect must be cured by Parliament and not the court given the principles of statutory interpretation and the clear G constitutional provision which I have enumerated earlier for deciding otherwise would, in the words of Abdoolcader SCJ in *Television Broadcasts Ltd. & Ors* [1985] 2 MLJ 34, 'amount to unwarranted transgression into the legislative domain'. Therefore, whilst the House of Lords in *Ashley*'s case could circumvent the same statutory prohibitions in their law since their H Constitution is unwritten, I could not do the same because of art 162(6).

[134] Saying this does not mean that the appellants are allowed to walk away scot free for the wrong that had been done to the deceased. Without resorting to or giving a violent interpretation to the clear provision of s 8(2) of the CLA, I on the facts of this case, punishment can and ought to be meted out under aggravated damages, which the respondents had also specifically prayed for in their statement of claim. I say this because firstly, from its very nature, aggravated damages is to compensate the victim or as in this case, his estate for the unacceptable behaviour of the appellants. As stated by the learned author in

McGregor on Damages (19th Ed) at p 1653:

> Aggravated damages come into the picture where the injury to the claimant's feelings is increased by the flagrancy, *malevolence and the particularly unacceptable nature of the assaulting defendant's behaviour.* (Emphasis added.)

[135] Thirdly, these two types of damages are intertwined when it comes to this particular tortious claim. Lord Devlin in *Rookes*'s case at pp 1229–1230 recognised and discussed the intertwining principles governing the award of these two damages when His Lordship held as follows:

> The sums awarded as compensation for the assault and trespass seem to me to be as high as, if not higher than, any jury could properly have awarded even in the outrageous circumstances of the case; and I can see no justification for the addition of an even larger sum as exemplary damages. The case was not one in which exemplary damages ought to have been given as such.
>
> This conclusion will, I hope, remove from the law a source of confusion between aggravated and exemplary damages which has troubled the learned commentators on the subject. Otherwise, it will not, I think, make much difference to the substance of the law or rob the law of the strength which it ought to have. *Aggravated damages in this type of case can do most, if not all, of the work that could be done by exemplary damages. In so far as they do not, assaults and malicious injuries to property can generally be punished as crimes, whereas the objectionable conduct in the categories in which I have accepted the need for exemplary damages are not, generally speaking, within the criminal law and could not, even if the criminal law was to be amplified, conveniently be defined as crimes. I do not care for the idea that in matters criminal an aggrieved party should be given an option to inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law.* (Emphasis added.)

[136] What Lord Neuberger said in *Ashley*'s case at p 996 para 102 is equally instructive on this point and is reproduced below:

> 102 Aggravated damages are awarded for *feelings of distress or outrage as a result of the particularly egregious way or circumstances in which the tort was committed*, or in which its aftermath was subsequently handled by the defendant. (Emphasis added.)

In this case, there is no denying the exacerbation of the above- mentioned feelings by the very fact that the deceased had died due to the inaction of the ones who were there to enforce the law.

[137] Therefore, based on the authorities cited above whilst at the same time giving due deference to the express prohibition in s 8(2) of the CLA, the respondents in this case should be entitled to be compensated with aggravated damages which amount must reflect the sufferings of the deceased and at the same time the sheer abhorrence of the court against the negligent conduct of the appellants, even though the degree of its seriousness is not on the same

A footing as other reported cases where the deaths of the detainees were the result of physical abuse by their custodians. Factoring such feeling of the court is permissible as held by Lord Hailsham in *Broome*'s case at p 1073:

> In awarding 'aggravated' damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and, as the result of the conduct exciting the indignation, demands a more generous solatium.

[138] Thus, I would answer the legal question posed in the affirmative and consequentially reaffirm the decision of this court in *Kugan*'s case. Consquentially, this appeal is allowed and based on the reasons I have elaborated earlier, I would substitute the sum of RM200,000 awarded as exemplary damages to be that under aggravated damages. I would, in furtherance of the same abhorrence mentioned above, make no order as to cost despite the success of the appellants in this appeal.

[139] My learned sister and brother judges, Rohana bt Yusuf, PCA, Abang Iskandar bin Abang Hashim CJ (Sabah and Sarawak), Abdul Rahman bin Sebli FCJ, Zabariah bt Mohd Yusof FCJ, and Hasnah bt Dato' Mohammed Hashim FCJ, have read this judgment in draft and have expressed their agreement with it.

Order accordingly.

Reported by Ashok Kumar